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No. 106

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER,

v.

THE THAYER-WEST POINT HOTEL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	11
Summary of argument	11
Argument	15
Respondent is not entitled to interest for any period prior to the rendition of the judgment below	15
A. "Just compensation" normally implies an obligation to pay interest only where the Constitution requires such payment to make whole owners whose property is invountarily taken by eminent domain	20
B. Since the Act of March 30, 1920, contemplates a wholly voluntary arrangement, it is highly improbable that Congress intended to entitle respondent to interest as of right	29
C. The legislative history of the Act of March 30, 1920, and the then current eminent domain concept of "just compensation" indicate that Congress did not intend to require allowance of interest	31
1. Legislative history of the Act of March 30, 1920	31
2. The eminent domain concept of "just compensation" prevailing in 1920	35
D. The established presumption is that non-eminent domain statutes intend to bar interest unless Congress expressly provides to the contrary	40
E. The lease does not provide for payment of interest, either expressly or by implication	43
Conclusion	48

CITATIONS

Cases:

Albrecht et al. v. *United States*, Nos. 148–151 and 155, Oct. Term, 1946 — 28

American Smelting & Refining Co. v. *United States*, 259 U. S. 75 — 28

723278—46——1

Cases—Continued

	Page
Atlantic Refining Co. v. *United States*, 69 C. Cls. 713, certiorari denied, 282 U. S. 859	28
Baumann v. *Ross*, 167 U. S. 548	36
Booth & Co. v. *United States*, 61 C. Cls. 805	39
Boston Sand Co. v. *United States*, 278 U. S. 41	17, 41, 42, 45
Brooks-Scanlon Corp. v. *United States*, 265 U. S. 106	17
Brown v. *United States*, 263 U. S. 78	17
Cherokee Nation v. *United States*, 270 U. S. 476	28, 41
Chickasaw Nation v. *United States*, 94 C. Cls. 215	21
Danforth v. *United States*, 308 U. S. 271	35
Goltra v. *United States*, 91 C. Cls. 42	23
Harvey v. *United States*, 113 U. S. 243	41
Harvey v. *United States*, 105 U. S. 671	42
Hetzel v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26	20
Hind v. *United States*, 70 C. Cls. 288	41
Hovey v. *New England Nav. Co.*, 83 Conn. 278	20
Hutchison v. *United States*, 57 C. Cls. 517	39
International Harvester Co. v. *United States*, 72 C. Cls. 707	39
Jacobs v. *United States*, 290 U. S. 13	17, 25, 26, 38, 40
Liggett & Myers Tobacco Co. v. *United States*, 61 C Cls. 693, reversed, 274 U. S. 215	17
Luckenbach Steamship Co. v. *United States*, 272 U. S. 533	46
New York & Porto Rico S. S. Co. v. *United States*, 29 F. 2d 1014	28, 31
Olympia Shipping Corporation v. *United States*, 71 C. Cls. 251, certiorari denied, 284 U. S. 680	28
Phelps v. *United States*, 274 U. S. 341	17, 26, 27
Richmond, Fredericksburg & Potomac Railroad Co. v. *United States*, 95 C. Cls. 244	41
Seaboard Air Line Ry. v. *United States*, 261 U. S. 299	17, 25, 27, 38, 40
Sheckels v. *District of Columbia*, 246 U. S. 338	17
Shoemaker v. *United States*, 147 U. S. 282	36
Shoshone Tribe v. *United States*, 299 U. S. 476	17, 18, 26
Smyth v. *United States*, 302 U. S. 329	16, 17, 18, 25, 38, 40
Squaw Island Freight Terminal Co. v. *United States*, 89 C. Cls. 269	21, 23
Tillson v. *United States*, 100 U. S. 43	16, 28, 41
Torkomian v. *Russell*, 90 Conn. 481	20
Towne v. *Eisner*, 245 U. S. 418	24
Tulley v. *Tranor*, 53 Cal. 274	20
United States v. *Benedict*, 261 U. S. 294	17
United States v. *Commonwealth Line*, 278 U. S. 427	17
United States v. *Creek Nation*, 295 U. S. 103	17, 26
United States v. *Goltra*, 312 U. S. 203	12, 14, 16, 19, 21, 22, 23, 41, 42
United States v. *Klamath Indians*, 304 U. S. 119	18
United States v. *North American Co.*, 253 U. S. 330	16, 17, 27, 36, 37, 38, 41, 46

Cases—Continued	Page
United States v. *North Carolina*, 136 U. S. 211	17
United States v. *Rogers*, 255 U. S. 163	17, 27, 38
United States v. *Sherman*, 98 U. S. 565	17
United States v. *Verdier*, 164 U. S. 213	16
United States ex rel. Angarica v. *Bayard*, 127 U. S. 251	17, 28, 41
United States ex rel. Tennessee Valley Authority v. *Powelson*, 319 U. S. 266	24
Virginia Engineering Company, Inc. v. *United States*, 89 C. Cls. 457	23
Waite v. *United States*, 282 U. S. 508	26
West v. *Chesapeake and Potomac Tel. Co.*, 295 U. S. 662	20
Willard R. Cook & Co., Inc. v. *United States*, 55 C. Cls. 537	39
Willard R. Cook & Co., Inc. v. *United States*, 80 C. Cls. 708	39
Yearsley v. *Ross Constr. Co.*, 309 U. S. 18	26
Constitution and Statutes:	
Fifth Amendment	12, 20
Act of March 3, 1863, 12 Stat. 765, 766	16
Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257	36, 37
Act of March 4, 1917, 39 Stat. 1168	24
Act of June 15, 1917, 40 Stat. 182	24
Contract Settlement Act of 1944, 58 Stat. 649, 654, 41 U. S. C., Supp. V, 106 (f), Sec. 6 (f)	42
Declaration of Taking Act of February 20, 1931, 46 Stat. 1421 (40 U. S. C. 258a), Sec. 1	37, 46
Judicial Code, Section 177 (a), 28 U. S. C. 284	3, 11, 16, 22, 28, 37, 41, 42, 43
Lever Act of August 10, 1917, 40 Stat. 276, Section 10	24
Military Academy Appropriation Act of March 4, 1919, 40 Stat. 1336	32
Military Academy Appropriation Act of 1921 (Act of March 30, 1920, 41 Stat. 538)	2, 12, 13, 29, 39, 44
National Defense Act of June 3, 1916, 39 Stat. 166, Sec. 120	24
Miscellaneous:	
15 Amer. Juris. 400	21
9 Comp. Gen. 421	28
59 Cong. Rec.:	
3031–3032	33, 34
3672	35
4044–4045	35
4074–4075	35
17 Corp. Jur. 716	21
H. Rep. No. 620, 66th Cong., 2d Sess.	32
1 Op. A. G. 268, 550, 554	17, 42
3 Op. A. G. 635	17, 42
4 Op. A. G. 14, 1136, 286	17
7 Op. A. G. 523	17, 42

Miscellaneous—Continued

	Page
9 Op. A. G. 57	17, 42
9 Op. A. G. 449	17, 42
S. Rep. No. 456, 66th Cong., 2d Sess., p. 2	34
Sutherland, *Damages* (3d Ed., 1903), p. 36 *et seq*	20

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OPINION BELOW

The opinion of the Court of Claims (R. 32–38) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on May 15, 1946 and was granted on October 14, 1946 (R. 39). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288 (b).

QUESTION PRESENTED

Whether Congressional use of the phrase "just compensation," in a statute authorizing a lease of Government land for the construction of a hotel and payment to the lessee at the termination of the lease for buildings constructed by him upon the land, empowered the Court of Claims to include in its judgment interest from the date of the agreed termination of the lease, despite the provisions of Section 177 (a) of the Judicial Code.

STATUTES INVOLVED

1. The pertinent part of the Military Academy Appropriation Act, 1921 (Act of March 30, 1920, 41 Stat. 538, 548), provides:

> That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to

said lessees at the termination of said lease.

2. The pertinent part of Section 177 (a) of the Judicial Code, 28 U. S. C. 284, provides:

> (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *.

STATEMENT

Pursuant to authorization contained in the Act of March 30, 1920, *supra,* the Secretary of War, on October 17, 1924, leased a tract of land within the West Point Military Reservation to one Herbert Williams for the purpose of having a hotel constructed and operated on the land thus leased. The lease was for a term of 50 years from October 17, 1924, and was made in consideration of one dollar (R. 6, 22). Williams agreed to erect a hotel and all other necessary buildings in connection therewith, in accordance with plans which he had submitted with his bid, and subject to approval of final plans and specifications by the Superintendent of the Military Academy and by the Secretary of War (R. 22). The lease provided that the title to such buildings should remain in the lessee until the expiration of the term, or until cancellation by the Secretary of War in the manner provided in the lease, and that, on such termination, title to the buildings

should pass at once to the United States subject to the lease provisions for the payment of just compensation by the United States (R. 22–23). The lease also provided that, on termination by expiration of the fifty year term, "just compensation" would be made to Williams for the "* * * construction of said hotel, appurtenances and equipments which may then be upon the demised premises" (R. 11, 23).[1] Williams' main undertakings were to begin construction within six months and to complete the hotel within two years thereafter (R. 6); to furnish protective bonds against liens (R. 7); to establish approved standard rates for rooms and meals, with certain discounts to specified classes of persons (R. 7); to provide fire, liability and compensation insurance (R. 8); to restore or repair buildings damaged by fire (R. 8); and to operate the hotel at all times during the continuance of the lease (R. 8–9). Upon the lessee's failure to observe these and the other conditions of the lease, the Secretary of War, after giving reasonable opportunity to correct the deficiency, could nullify and forfeit the lease. In that event, "just compensation shall be made to the party of the second part, or his assigns, for the con-

[1] The Act of March 30, 1920, *supra*, provided for just compensation to the lessee for "the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease" (R. 22).

struction of said hotel, appurtenances and equipments" (R. 11, 23).

In addition to the lease of land to Williams for one dollar ground rent with "just compensation" at termination or forfeiture, the Secretary of War agreed to furnish the hotel with electricity for light and power at the same price paid by the Quartermaster Department to the Military Academy (R. 9); to furnish the hotel a water supply at cost (R. 9–10); to permit the hotel to obtain surplus ice from ponds on the Military Reservation (R. 9); and to allow the hotel to utilize the Academy sewerage system without charge (R. 10). It was also agreed that if another hotel should be permitted or erected on the West Point reservation, the lessee had the option of terminating the lease and securing "just compensation as above provided as of the date of such termination" (R. 12). Other minor concessions were made (R. 9–10).

Williams assigned the lease to the Thayer-West Point Hotel *Corporation*, a corporation organized under the laws of New York on March 20, 1925, which constructed and completed a hotel within the time required by the lease (R. 24, 22). Prior to the completion of construction, on August 1, 1925, that corporation conveyed the lease and the corporation's interest therein, together with the corporation's right, title or in-

terest to any building placed on the land covered by the lease, personal property used therein, and all compensation to become due upon the termination of the lease, to trustees under an indenture which secured bonds in the aggregate amount of one million dollars issued by the corporation to finance construction (R. 24).[2]

The corporation took possession of the hotel buildings in June, 1926, prior to completion, and operated the hotel thereafter under the terms of the lease (R. 24). On August 8, 1927, the corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York (R. 25), and, in an apparently contemporaneous foreclosure action brought by the first mortgage trustees in the New York Supreme Court, a judgment was entered on January 17, 1929, which ordered the sale of the property described in the first mortgage (R. 25).[3] The leasehold estate and other properties covered by the first mortgage were sold on July 8, 1930, at a public foreclosure sale, to a committee acting on behalf of certain holders of the corporation's

[2] On April 1, 1927, the corporation entered into a second mortgage arrangement to secure a $500,000 issue of bonds (R. 24).

[3] The Court of Claims found that the property here involved, by reason of the first lien and foreclosure proceedings in the State court, was never administered by the trustee in bankruptcy, and that no dividend was ever paid in the bankruptcy proceeding to any creditor of the corporation (R. 25).

mortgage bonds (R. 25). The sale price was $25,000 and a deficiency judgment of $1,235,067.67 was entered against the corporation (R. 25).

The bondholders' committee, pursuant to a plan of reorganization under which the hotel was purchased, assigned the interest acquired at the foreclosure sale to the respondent herein, The Thayer-West Point Hotel *Company,* a new corporation organized under the laws of Delaware on November 7, 1930 (R. 22, 25–26). First mortgage bondholders of the original corporation surrendered bonds to the extent of $879,400 face value out of the one million dollars issued, and received, in exchange, $439,700 face value of bonds issued by respondent, and shares of no-par stock (R. 25–26).[4] Such bonds and common stock are presently outstanding (R. 26). Respondent also mortgaged the leasehold estate and other hotel property for $125,000.00 (R. 26). This mortgage indebtedness is presently outstanding in the principal amount of $115,000.00, with unpaid interest at 6 percent from January 1, 1942 (R. 26).

On December 26, 1930, the referee appointed by the state court in the foreclosure proceeding delivered to respondent a deed conveying the leasehold estate and other property covered by the sale (R. 26). Shortly thereafter, the respondent obtained quitclaim deeds from the trustee in

[4] Holders of the remaining first mortgage bonds received proportionate distributive shares from the proceeds of the $25,000 paid at the foreclosure sale (R. 26).

bankruptcy of the original corporation, the trustees under the second mortgage, and the trustee of the original first mortgage (R. 26). On December 22, 1930, the Superintendent of the Military Academy gave "his written approval of the assignment of the lease" (R. 26). Respondent took possession of the hotel on January 1, 1931 and operated it under the terms of the lease until March 10, 1943 (R. 27).

On January 5, 1943, respondent suggested to the Secretary of War, by letter, that conditions then existing made the operation of the hotel impossible and that the hotel might have to be closed (R. 27). Respondent stated that, if the hotel fell into the hands of outside interests, through the foreclosure of the existing first mortgage, the bondholders would be deprived of any return on their original investment, and that the operation of the hotel might then be conducted to the detriment of the officers and cadets of the Academy and their guests (R. 27). The solution of this problem urged by respondent was government ownership and operation of the hotel (R. 27). Respondent, accordingly, requested that the Secretary of War declare the lease forfeited, in accordance with its provisions (R. 27–28). The occasion for the forfeit was to be a default by the respondent, namely, the closing of the hotel (R. 28). Respondent stated that since its "holdings and the value thereof depend[ed] upon a contract, authorized by and embodied in the lease,"

just compensation to the lessee would be available to protect it, if the method of cancellation provided in the lease were followed (R. 15, 27–28). The Secretary of War agreed to this procedure (R. 17, 29). Details of the forfeiture of the lease were worked out (R. 28, 29) and the hotel was closed by respondent on March 10, 1943, on which day it was taken over by agents of the Secretary of War (R. 29). The Secretary formally annulled the lease on March 24, 1943 (R. 29–30).

On April 19, 1943, respondent wrote to the Secretary of War with regard to just compensation under the lease and fixed the tentative amount at approximately $2,300,000.00 (R. 30). On May 19, 1943, the present action was instituted by respondent in the court below (R. 1). The complaint alleged that no reply had been made by the Secretary of War to its request for just compensation in the amount of $2,300,000.00[3] and prayed for judgment in the sum of $1,932,000.00 (R. 5).[4]

[3] On May 21, 1943, the Secretary of War answered respondent's letter of April 19, stating that the tentative amount of $2,300,000.00 appeared far in excess of the property's reasonable value and that it would be necessary to have the matter determined in court (R. 30).

[4] On May 20, 1943, the day after the instant case was commenced, the United States filed a condemnation suit for the property here involved in the District Court of the United States for the Southern District of New York. On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending the final determination of the instant case in the Court of Claims (R. 30).

The court below found the fair and reasonable original cost of constructing the hotel and its appurtenances to be approximately $1,300,000.00 (R. 30).[7] The court further found that the reproduction cost as of March 10, 1943, would have been $1,138,160.00 without landscaping or financing costs (R. 31). Market value for the hotel was found to be non-existent as of that date (R. 31). It was then concluded that, considering "all relevant facts and circumstances," the fair and reasonable value of the hotel as of March 10, 1943 was $820,682.00 (R. 31–32). To this amount was added the fair and reasonable value of the hotel equipment ($47,000), giving a total of $867,682.00 (R. 32). To this total, the court below added interest at 4 per cent from March 10, 1943, as an addition necessary to constitute "just compensation as of the date of payment" (R. 32). Judge Whitaker dissented, stating that "$500,000 would be liberal compensation" (R. 38).

[7] In connection with this finding, the court below also found that the books of original entry, covering cost of construction, had been destroyed on or about February 25, 1938, by the attorneys for the trustee in the bankruptcy proceedings mentioned above (R. 30). In its opinion, the court below stated, after referring to the destruction of the original books of entry, that the evidence surviving as to actual original cost of construction was in general "too fragmentary, indefinite, and otherwise unreliable to warrant definite findings with regard thereto" (R. 36). The finding of an original cost of $1,300,000.00 which the court below nevertheless made was characterized as "therefore approximate only" (R. 36).

The petition for the writ of certiorari raises only the issue of the addition of interest since March 10, 1943. The United States raises no question as to the basic award of $867,682, nor has the respondent filed a cross petition questioning the judgment.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to hold that Section 177 (a) of the Judicial Code precluded it from allowing interest on this claim against the United States prior to the time of rendition of its judgment.

2. In holding that the use of the words "just compensation" in the Act of March 30, 1920, *supra,* called for the same assessment of damage as would apply to a taking of property by eminent domain.

3. In holding that the Act of March 30, 1920, *supra,* authorized it to award interest prior to the date of its judgment.

4. In including in its judgment interest on the claim.

SUMMARY OF ARGUMENT

Since Section 177 (a) of the Judicial Code forbids interest to be "allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," the lower court's allowance of interest cannot

stand unless the words "just compensation * * * for the construction of said hotel," in the Act of March 30, 1920, and in the lease, are held to require such an allowance. The only instances in which the phrase "just compensation" has hitherto been considered to include the payment of interest are eminent domain matters, but no claim is made here that Congress was actually exercising its eminent domain power in the 1920 Act. The most that can be claimed is that Congress intended to use the term in its full eminent domain sense, even though there was to be no eminent domain taking. This contention is entirely unsupported, and [illegible] the lower court's award of interest.

1. "Just compensation" is not a word of art necessarily importing an obligation to pay interest. It is commonly used to describe the proper measure of damages in normal tort or contract actions. It has been used by the Congress in permitting suit on a claim for the tortious forfeiture of a lease, and this Court has refused to award interest. *United States* v. *Goltra*, 312 U. S. 203. Indeed, the only cases in which "just compensation" has been held to require the allowance of interest have been instances of the actual exercise of the eminent domain power. In these cases, the addition of interest has been rested squarely on the requirements of the Fifth Amendment and not on the statutory provision

for "just compensation," or other particular form of words chosen by the legislature. Where private property is taken *in invitum* by the Government, the Constitution demands that the owner be made whole as of the time he loses use or possession of the property; when payment is deferred, interest is necessary to produce the full equivalent of the property's value paid contemporaneously with the taking. But where the Government does not impose its will upon the owner, and he is free to sell his property, and to bargain for the terms of its sale, there is neither Constitutional nor policy reason to assure him of this full measure of protection. He is subject to the usual rules governing those dealing with the Government, and is held not entitled to interest on the sale price, even if payment is delayed, unless there is an express stipulation for interest in the contract.

2. The Act of March 30, 1920, contemplates a wholly voluntary and consensual arrangement, and it is therefore highly improbable that the Congress intended to *require* the allowance of interest which is ordinarily accorded only where property is taken *in invitum* by eminent domain. Respondent's assignor freely undertook the obligations of the lease, and the terms of the agreement he made with the Government were entirely open to negotiation and bargaining. He could have insisted on detailed provision for "just com-

pensation," including a stipulation for interest or a specific sum. There was no hint of an involuntary "taking" in the entire transaction. Respondent's claim is purely a contractual one, founded on a contract voluntarily negotiated by its predecessor. In these circumstances, it is just as improbable that the Congress intended in the 1920 Act to require the payment of interest as it was in the legislation considered in *United States* v. *Goltra, supra.*

3. Likewise, the legislative history of the 1920 Act, together with the then prevailing eminent domain concept of "just compensation", fortifies the position that the Congress did not intend to require the allowance of interest. Not only is the legislative history of the statute devoid of all reference to eminent domain, but there is strong indication therein that the matter of compensation was conceived as one for settlement by agreement rather than on the basis of an eminent domain concept. Moreover, at the time of the enactment of the 1920 Act, there was in existence no ruling by this Court to the effect that even in an eminent domain case, interest was allowable where the suit was brought by the claimant against the United States. Hence, the Congress legislated in the light of the prevailing doctrine rather than on the hypothesis of a different concept which was later to be enunciated by this Court.

4. Any doubt as to the proper construction of the 1920 Act and of the lease should be resolved in favor of the Government, by the long-established presumption that non-eminent domain statutes intend to bar interest unless the Congress expressly or specifically provides to the contrary.

5. Nor does the lease itself stipulate for the payment of interest, either expressly or by implication. Interest is never mentioned, and the statutory formula is merely reiterated, without more, both in the case of termination by expiration of the fifty-year term, and of the Government's annulment of the lease for breach by the lessor. In the latter case, which is the present situation, it is especially unlikely that the parties intended to allow interest. The lessee's own fault having occasioned the premature take-over and having necessitated the immediate determination of the compensation award, it would be most unfair to saddle the Government with interest charges during the time it takes to compute the amount.

ARGUMENT

RESPONDENT IS NOT ENTITLED TO INTEREST FOR ANY PERIOD PRIOR TO THE RENDITION OF THE JUDGMENT BELOW

In the instant case, the Court of Claims entered judgment for respondent for the value of the hotel property at West Point together with interest thereon from March 10, 1943, the date

on which the United States took over the property pursuant to contract. It purported to find justification for its allowance of interest in the face of the prohibitory statute because of the fact that both the contract and the statute employed the words "just compensation." We submit that the presence of those words in the authorizing statute and in the contract constitutes no justification for evading the plain prohibition against the allowance of interest contained in Section 177 (a) of the Judicial Code, 28 U. S. C. 284, *supra*.

Section 177 (a) of the Judicial Code provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *." Accordingly, it is well settled that interest may not be recovered in a suit against the United States unless specifically provided for by contract or authorized by act of Congress.[8] Section 177, derived from the Act of March 3, 1863, 12 Stat. 765, 766, is merely declaratory of the common law principle that interest does not run against the Government in the absence of a statute or a contract evincing a contrary

[8] *Tillson* v. *United States*, 100 U. S. 43; *United States* v. *Verdier*, 164 U. S. 213, 216; *United States* v. *North American Co.*, 253 U. S. 330, 336; *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *Goltra*, 312 U. S. 203.

intention.[9] An apparent exception to this rule is that, in the case of a taking of property under the power of eminent domain, interest from the date of the taking is included in the recovery as a part of just compensation.[10] This doctrine is based upon the theory that the Fifth Amendment entitles the owner to receive the full value of his property at the time of the taking. Hence, interest is included in the award not as such, but as a means of putting the condemnee in as good a financial position as he would have enjoyed had he received compensation at the time of the taking.[11] "The allowance of interest in eminent

[9] *Boston Sand Co.* v. *United States*, 278 U. S. 41; *United States* v. *Commonwealth Line*, 278 U. S. 427; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330, 336; *United States* v. *North Carolina*, 136 U. S. 211, 216; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *United States* v. *Sherman*, 98 U. S. 565, 567–568; *Smyth* v. *United States*, 302 U. S. 329, 353; *Sheckels* v. *District of Columbia*, 246 U. S. 338, 340; 1 Op. Atty. Gen. 268, 550, 554; 3 Op. Atty. Gen. 635; 4 Op. Atty. Gen. 14, 136, 286, 7 Op Atty. Gen. 523; 9 Op. Atty. Gen. 57, 449.

[10] *United States* v. *Rogers*, 255 U. S. 163; *United States* v. *Benedict*, 261 U. S. 294; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brown* v. *United States*, 263 U. S. 78, 86–88; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215; *Phelps* v. *United States*, 274 U. S. 341; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*, 295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496.

[11] *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Creek Nation*,

domain cases is only an apparent exception, which has its origin in the Constitution." *Smyth* v. *United States*, 302 U. S. 329, 353. See *infra*, pp. 24–27.

Respondent's suit rests wholly upon the terms of its lease-agreement with the Government (R. 5), and no claim is made that the hotel has been taken under the power of eminent domain. The Court of Claims expressly stated that "here there was no taking in the legal sense" (R. 36), "the suit here is on a contract and not for compensation under the Fifth Amendment" (R. 37), and "neither in the Act nor in the lease is there any provision for just compensation for a taking" (R. 36).[12] Nor is it claimed by respondent or

295 U. S. 103, 111; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496; *United States* v. *Klamath Indians*, 304 U. S. 119, 123.

[12] As stated above, footnote 6, p. 9, on May 20, 1943, the day after respondent instituted the present suit, the United States filed a condemnation action for the property here involved. The Secretary of War had previously indicated that condemnation proceedings would be instituted "for the purpose of clearing the title to the buildings, appurtenances and equipment, and of determining the just compensation to be paid to the owners in accordance with the statute" (R. 17, 29). On February 7, 1944, an order was entered in that action staying all further proceedings therein, pending final disposition of this case (R. 30). In view of the judgment entered in the instant suit, that case is, of course, now moot. In any event, if there had been a taking of respondent's property by eminent domain, just compensation for the taking could have been adjudicated in that suit, but in the present suit respondent does not base its claim on such a taking, and whether there was a taking for the purpose of that case is not material in the case at bar.

by the court below that either the Act of March 30, 1920, or the lease-agreement, provides in terms for interest to be paid by the United States. Interest was nevertheless claimed from the day the Government took possession of the hotel to the date of the judgment below, and the Court of Claims, although purporting to recognize Section 177 (a) of the Judicial Code, awarded "interest at four percent per annum from March 10, 1943, to the date of payment, not as interest but as a part of just compensation" (R. 32).

In the absence of any claim of an eminent domain taking, respondent and the lower court must find their sole warrant for the award of interest in the language "just compensation * * * for the construction of said hotel, appurtenances, and equipments" which appears in the statute, and which was carried over by the parties into the lease. As in *United States* v. *Goltra*, 312 U. S. 203, 207–208, respondent's "argument is that the words 'just compensation' have within themselves the same legal significance of interest on the award or damages from the date of the taking as has been given to these same words as used in the Fifth Amendment," and the Court of Claims so held (R. 38). In our view, neither the language of the 1920 Act nor that of the lease justifies an award of interest. The term "just compensation" does not in and of itself connote an award of interest and the nature of the arrangement contemplated by the 1920 Act makes

it very improbable that the Congress desired to assimilate respondent's recovery to a complete eminent domain award.

A. "JUST COMPENSATION" NORMALLY IMPLIES AN OBLIGATION TO PAY INTEREST ONLY WHERE THE CONSTITUTION REQUIRES SUCH PAYMENT TO MAKE WHOLE OWNERS WHOSE PROPERTY IS INVOLUNTARILY TAKEN BY EMINENT DOMAIN

1. The words "just compensation" are not words of art necessarily or even commonly importing an obligation to pay interest. In condemnation cases, the Fifth Amendment provision that private property shall not be taken for public use without "just compensation" requires the award of interest from the date of taking. See *supra*, p. 17. But even as used in the Fifth Amendment, "just compensation" does not refer solely to the eminent domain measure of damages. It has also been used to describe the right of a utility to a reasonable rate of return, on the fair value of its property. See *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U. S. 662, 671. And "just compensation" is widely used both by the courts and by text writers to describe the measure of compensation in actions to recover damages for torts or breach of contract.[13] The Court of

[13] See e. g., *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26, 37; *Yorkomian* v. *Russell*, 90 Conn. 481, 485, 97 Atl. 760; *Howey* v. *New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469; *Tulley* v. *Tranor*, 53 Cal. 274, 280; Sutherland, *Damages* (3d ed. 1903), p. 36 *et seq.*

"The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or

Claims has itself denied interest on a special statutory claim for "just compensation." *Squaw Island Freight Terminal Co.* v. *United States,* 89 C. Cls. 269, 278.[14] Cf. *Chickasaw Nation* v. *United States,* 94 C. Cls. 215, 239. And this Court has also declined to read an authority to allow interest into a statutory prescription to pay "just compensation" for property taken over by the Government otherwise than by eminent domain. In the closely analogous case of *United States* v. *Goltra,* 312 U. S. 203, certain tugs and barges which had been leased to the plaintiff by the Government had been tortiously seized by an Army officer under orders from the Acting Secretary of War. Goltra failed to secure possession of the boats through several court proceedings, and the Congress ultimately enacted a special jurisdictional act granting the Court of Claims authority to hear the claimant's case and to award "just compensation to him for certain vessels and unloading apparatus taken, whether tor-

negligent act or omission shall have fair and just compensation commensurate with the loss sustained." 15 Amer. Juris. 400.

"The primary object of an award of damages in a civil action, and the theory upon which it is based, is just compensation or indemnity for the loss or injury sustained by the complainant." 17 Corp. Jur. 716.

[14] That jurisdictional act granted authority to hear the plaintiff's claim for "just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed government dike on Squaw Island."

tiously or not, on March 25, 1923, by the United States under orders from the Acting Secretary of War, for the use and benefit of the United States." As here, the Court of Claims allowed interest "not as interest but as a part of just compensation." On appeal, this Court reversed, holding (312 U. S., at 211), first, that the "unauthorized taking and judicially approved retention was in no sense an exercise of the power of eminent domain," and, secondly, that "if interest was to be allowed for so long a period upon an ordinary claim, and contrary to established governmental practice, Congress would have so declared." Here, there has likewise been no exercise of the eminent domain power, and the claim upon which respondent sues is an ordinary contractual claim. Established governmental practice has long denied interest on just such claims (Judicial Code, Section 177 (a); and see *supra*, pp. 16–17), and mere Congressional use of the "just compensation" formula should no more constitute a departure from this practice in the instant case than it did in the *Goltra* case. There is even stronger reason for denying interest here, where the Government's acquisition of respondent's hotel followed from a voluntary agreement bearing respondent's full consent that the lease should be forfeited, in accordance with its terms, while the *Goltra* case involved the forfeiture of his lease and the consequent recapture by the Government of the property against Goltra's will.

These are all instances of judicial or legislative use of "just compensation" in other than the eminent domain sense. As we point out below (*infra*, pp. 35–40), in 1920 there existed a substantial understanding that even in eminent domain proceedings "just compensation" did not always entail an award of interest. It is clear, therefore, that there has been no usage of the term as always denoting an eminent domain measure of damages, and hence as always requiring the payment of interest. Indeed, the only cases[15] respondent can cite in which the term "just compensation" has been held to carry with it an award of interest are those involving instances of the actual exercise of the eminent domain power.[16] In those instances in which the Congress was not acting under its eminent domain power, its use of the term "just compensation" has been held not to justify such an award. *United States* v. *Goltra, supra; Squaw Island Freight Terminal Co.* v. *United States, supra.*

2. Moreover, even in eminent domain cases, the granting of interest stems not from the wording of the statute under which suit is brought but

[15] *Virginia Engineering Company, Inc.* v. *United States*, 89 C. Cls. 457, decided November 6, 1939, which did allow interest in a non-eminent domain case, was on all fours with the *Goltra* case, and served as the sole authority for the Court of Claims' decision in the latter case (91 C. Cls. 42, 75), which this Court reversed in *United States* v. *Goltra, supra.*

[16] See cases cited in footnotes 10 and 11, *supra*, pages 17–18.

from the Constitution. The relevant cases have mainly arisen under one or another of the statutes enacted during World War I to provide for the exercise of the federal eminent domain power in connection with the national war effort. These statutes authorized the President to requisition property for war needs, and to modify, suspend, cancel, or requisition contracts of certain types; directed him to pay "just compensation" therefor; and provided that the United States might be sued for any balance necessary to make up "just compensation."[17] The opinions of this Court allowing interest against the United States in suits for takings of property under these statutes rest, clearly and explicitly, on the Fifth Amendment, and not on the statutory provisions for "just compensation."[18] These cases even suggest that interest would not have been allowed had the right to it depended on the statutes.

[17] Lever Act of August 10, 1917, Section 10, 40 Stat. 276, 279; Act of March 4, 1917, 39 Stat. 1168, 1193; Act of June 15, 1917, 40 Stat. 182; National Defense Act of June 3, 1916, Sec. 120, 39 Stat. 166, 213.

[18] "Just compensation" in the Fifth Amendment need not, of course, have the same meaning as that term when used in a statute. Cf. *Towne* v. *Eisner*, 245 U. S. 418, 425. It is not the equivalence of words but of concepts that is significant. The provision of the Fourteenth Amendment that no state shall "deprive any person of * * * property, without due process of law" provides for the same measure of compensation as the Fifth Amendment's different wording. *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266, 278–279.

Certainly this Court has never treated the phrase "just compensation" as equivalent to a provision for interest. In the leading case, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304, the Court said:

> Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

And in *Jacobs* v. *United States,* 290 U. S. 13, 17, in describing the *Seaboard* decision, it was said:

> That suit was brought by the owner under § 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate. * * *

In *Smyth* v. *United States,* 302 U. S. 329, 353, Mr. Justice Cardozo aptly summarized the foundation for these interest awards in saying: "The allowance of interest in eminent domain cases is only an apparent exception, which has its origin in the Constitution." For this reason, in eminent

domain cases the phraseology of the particular act grounding the suit is immaterial; interest is included as required by the Constitution even if the suit is brought in the Court of Claims under the Tucker Act which is governed by Section 177 (a) (*Jacobs* v. *United States*, 290 U. S. 13, 17–18), under a special jurisdictional act which contains no mention of either interest or just compensation (*United States* v. *Creek Nation*, 295 U. S. 103, 105, 111–112; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 484–485, 496–497), or under a statute providing for "entire compensation." *Waite* v. *United States*, 282 U. S. 508; cf. *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 22. The constitutional requirement, and not the particular form of words chosen by the legislature, directs the award of interest. Or to put this conclusion in the narrower terms of statutory interpretation, these cases make it clear that in eminent domain matters the words "just compensation" are construed to include interest solely in order to satisfy the Constitution and sustain the validity of the jurisdictional acts. Cf. *Phelps* v. *United States*, 274 U. S. 341, 344.

3. This "apparent exception" to the rule that the Government is not chargeable with interest, i. e., the granting of interest in eminent domain cases, rests upon the principle that an owner whose property is taken from him *in invitum* by the Government is entitled to the full equivalent

of the property *at the time he loses its use or possession.* *United States* v. *Rogers*, 255 U. S. 163, 169, and cases cited in footnote 10, *supra*, p. 17. Interest represents either a "measure of compensation for the use and occupation during the period which precedes the passing of the title" (*United States* v. *North American Co.*, 253 U. S. 330, 337) or the increment which is necessary to make a later payment of the value at the time of taking "the full equivalent of that value paid contemporaneously with the taking." *Seaboard Air Line Ry. Co.* v. *United States*, *supra*, at p. 306. "The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." *Phelps* v. *United States*, *supra*, at p. 344.

Where, however, the Government does not exercise its privilege of having the value of property judicially determined and the owner by free negotiation fixes the value of his property, neither the Constitution nor the dictates of fair dealing requires that he be assured by law of this full measure of protection. As in all business dealings, the matter then becomes one for bargaining and negotiation. In the case of the sovereign, the private person dealing with the Government must, of course, understand the contractual incidents of the Government's special status, and either accept these privileges, bargain for their

limitation where that can validly be done, or refuse to contract. Cf. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78, 79.

Accordingly, an owner selling real or personal property to the Government is not entitled to interest on the sale price, even if payment is delayed, unless he expressly stipulates for interest in his contract. Judicial Code, Section 177 (a), 28 U. S. C. 284. *Smyth* v. *United States*, 302 U. S. 329, 353; *Tillson* v. *United States*, 100 U. S. 43, 47; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; 9 Comp. Gen. 421. The same principle is illustrated in the cases holding that owners, whose property was requisitioned during World War I and who entered into agreements accepting the contractual compensation in full satisfaction of their claims for just compensation arising out of the requisition, were not entitled to interest. The claimants' suits were held to be founded on the contract rather than on the Government's exercise of its eminent domain authority. *New York & Porto Rico S. S. Co.* v. *United States*, 29 F. 2d 1014, 1017 (C. C. A. 2); *Atlantic Refining Co.* v. *United States*, 69 C. Cls. 713, certiorari denied, 282 U. S. 859; *Olympia Shipping Corporation* v. *United States*, 71 C. Cls. 251, 263–264, certiorari denied, 284 U. S. 680.[19]

[19] In *Albrecht et al.* v. *United States*, Nos. 148–151 and 155, now pending on writs of certiorari to the United States

B. SINCE THE ACT OF MARCH 30, 1920, CONTEMPLATES A WHOLLY VOLUNTARY ARRANGEMENT, IT IS HIGHLY IMPROBABLE THAT CONGRESS INTENDED TO ENTITLE RESPONDENT TO INTEREST AS OF RIGHT

The nature of the arrangement authorized by the Act of March 30, 1920, makes it highly unlikely that Congress intended to override the provisions of Section 177 (a) of the Judicial Code by assimilating the Government's acquisition of respondent's hotel to an eminent domain taking. In essence the legislative plan contemplated a voluntary and contractual arrangement. (See discussion, *infra*, pp. 30–31.) The Congress was obviously not exercising the power to condemn private property, nor was it enabling the Secretary of War to do so. The Act merely *authorized* (and does not *require*) the Secretary to make a contract with a willing contractor under which (1) a hotel would be erected by the contractor on the West Point Military Reservation, (2) the hotel would be operated by the contractor (or his assignees) for a specified term, not exceeding fifty years, the operator to have the hotel's revenues, and (3) at the end of the specified term, the land and the hotel would revert to the United States and the contractor would receive "just

Circuit Court of Appeals for the Eighth Circuit, the Government argues that the United States is not obligated to pay interest upon an award in condemnation proceedings where no determination of just compensation is made but where the award is fixed, at the owner's insistence, at the amount set by a contract, which gave the United States the right of possession prior to payment and made no provision for interest.

compensation * * * for the construction of said hotel, appurtenances, and equipments." These terms of the lease were statutory directives and requirements fully known in advance by prospective contractors, and, subject to the few statutory conditions, the matter was open to free negotiation. Except for specifying the maximum term of the lease, requiring the hotel to be built according to approved plans, and enjoining the Government to make "just compensation * * * for the construction" on termination, the Congress did not limit the parties' full power to contract. The agreement was to "contain such conditions, terms, reservations and covenants, as may be agreed upon." If the Secretary had insisted on too stringent terms, the contractor was free to withdraw from the negotiations. Since he would have no economic stake in land or hotel before consummation of the agreement, he would be under no individual pressure to undertake the project or to agree to any terms he deemed to be unfair or burdensome. In fine, there was no apparent influence, individual or governmental, which would impel the potential contractor to bargain away rights which prudence would dictate that he should retain.

With specific reference to the instant problem, the contractor could have insisted on a detailed provision concerning the "just compensation * * * for the construction" to which he would be entitled. He

could have expressly stipulated for interest,[20] and thus have avoided the bar of Section 177 (a), or have negotiated for a definite formula, or even for a specific sum to be paid on termination or cancellation. Moreover, the proper compensation to be paid on expiration of the lease term might well be thought to be closely related to the rates to be charged,[21] and therefore a proper subject for negotiation and explicit understanding. In short, it was left to the parties to make a mutually satisfactory agreement, just as if the Act had simply authorized the Secretary to lease the land for the construction of a hotel for a period not exceeding fifty years, on terms and conditions to be agreed upon by the parties.

C. THE LEGISLATIVE HISTORY OF THE ACT OF MARCH 30, 1920, AND THE THEN PREVAILING EMINENT DOMAIN CONCEPT OF "JUST COMPENSATION" INDICATE THAT CONGRESS DID NOT INTEND TO REQUIRE ALLOWANCE OF INTEREST

1. Legislative history of the Act of March 30, 1920.—There is nothing in the legislative history

[20] Certain "requisition charters" entered into by the Government and shipowners upon the requisition of vessels in World War I provided that "in case of loss or damage due to the operation of a risk assumed by the United States, *just compensation for such loss or damage, with interest at 6 per cent per annum*, commencing thirty days after proof of such loss or damage shall be paid by the United States." See *New York and Porto Rico Steamship Co.* v. *United States*, 29 F. 2d 1014 (C. C. A. 2). [Italics supplied.]

[21] The Court of Claims indicates that the basis on which the rates were actually set and approved does not appear (R. 37).

of the 1920 statute to indicate that the Congress intended "just compensation * * * for the construction" to include an award of interest. Such indications of congressional intention as do exist all point to a contrary result. The Military Academy Appropriation Act of March 4, 1919 (40 Stat. 1336, 1348), had authorized the Secretary of War to contract for the erection of a hotel at West Point, but, at the end of fifty years, the hotel was to become Government property without compensation, and the revenues (to be regulated by the War Department) were to be the contractor's sole source of recouping its investment.[22] No contract could be procured on these terms, and the next year it was recommended that more liberal terms, in the form later embodied in the 1920 Act, be authorized. H. Rep. No. 620, 66th Cong., 2d Sess. The debate in the House of Representatives reveals that the

[22] The 1919 Act provided:

"The Secretary of War is hereby authorized to allow any corporation, company, or individual to erect on the United States Military Academy reservation at West Point, New York, a hotel, in accordance with plans and specifications to be approved by the Superintendent of the United States Military Academy and to enjoy the revenue therefrom for a period of fifty years; after which time said hotel shall become the property of the United States: *Provided*, That the title and ownership of said hotel may be accepted by the Secretary of War on behalf of the United States at any time. That said hotel shall be conducted under such regulations including the rates and the charges for accommodations thereat as may be promulgated by the Superintendent of the United States Military Academy under the direction of the Secretary of War."

sponsors hoped that some individual or company could be induced, perhaps more for patriotic reasons than from pecuniary motives, to erect and operate the hotel. 59 Cong. Rec. 3031–3032. It was believed that the commercial possibilities were limited but that the new terms would offer the contractor "* * * a fair opportunity at least * * *" to recoup on his investment, by the date of the termination of the lease. 59 Cong. Rec. 3032. Some Representatives did inquire whether the hotel should not go to the United States without further payment at the end of fifty years, since the lessee would receive revenue from the hotel's operations, but those in charge of the bill explained that it was doubtful that the enterprise would be commercially profitable, and the additional inducement was believed necessary. 59 Cong. Rec. 3031–3032. A pertinent colloquy reveals that the term "just compensation" was not viewed as a rigid concept but mainly as a broad framework for agreement by the parties at the time the negotiations for the lease should take place. Congressman Evans of Nevada wondered whether the sponsor did not feel that "this is rather loose language with reference to the compensation." Congressman Morin answered:

> No; that would be in accordance with an agreement with the War Department

when they originally enter into the lease." 59 Cong. Rec. 3031.[23]

No reference was made during the House debate to eminent domain or condemnation, either by way of analogy or as directly applicable.[24]

The Senate Committee on Military Affairs substituted the old 1919 provision for transfer of the hotel after fifty years without payment, after deleting the clause authorizing the War Department to regulate rates and charges (S. Rep. No. 456, 66th Cong., 2d Sess., p. 2), and this proposal was adopted by the Senate without significant

[23] The full interchange is as follows:

"Mr. EVANS of Nevada. Does not the gentleman feel that this is rather loose language with reference to the compensation?

"Mr. MORIN. No; that would be in accordance with an agreement with the War Department when they originally enter into the lease. At the end of 15 or 20 years the Government may want to take it back and ask the occupant to remove it, or they may enforce regulations under which the occupant might not want to operate the hotel and could not operate it profitably.

"Mr. DONOVAN. If the gentleman will yield, the proposal is to give the Government the right of election, if it so decides, that it needs the ground and to award an equity to investors which will recompense them for the sum invested.

"Mr. MORIN. Yes."

[24] Apparently for parliamentary reasons, at the end of the discussion the paragraph authorizing the lease and the erection of the hotel was stricken on a point of order, with consent of the sponsors (59 Cong. Rec. 3032) and not actually adopted by the House at that time. It was apparently understood, however, that the paragraph embodied the views of the House, which the conferees were expected to support. No amendments were offered during the debate.

discussion. 59 Cong. Rec. 3672. In conference, the Senate conferees receded and the committee adopted the language recommended by the House Committee and debated in the House (59 Cong. Rec. 4044–4045). The conference reports (59 Cong. Rec. 4044–4045; 4074–4075) merely paraphrase the provision, and there was no debate in either house on its final adoption.

It is significant that the legislative history of the Act contains no reference to the principles of eminent domain, nor does it indicate any desire to allow the potential lessee-contractor special statutory privileges not normally accorded those with whom the Government deals or to whom it contracts to pay money. The one specific inquiry as to the content of "just compensation" brought forth the answer, from an authoritative member, that "that would be in accordance with an agreement with the War Department when they originally enter into the lease." See *supra*, pp. 33–34. The matter was evidently conceived as one for mutual agreement or contract, rather than as one which was to be settled solely by the application of judicial principles governing the exercise of the power of eminent domain.

2. *The eminent domain concept of "just compensation" prevailing in 1920.*—The state of the decisions, in 1920, with respect to the eminent domain concept of "just compensation," also throws a clarifying light on the Congressional use

of that term. In March 1920, when the statute here involved was enacted, this Court had not yet announced the first of the series of decisions which have established the principle that in eminent domain proceedings just compensation includes interest from the date of the taking to the time of payment. Prior to June 1920, this Court had in no case established the relation of interest to just compensation for property taken under the power of eminent domain prior to payment.[25] On June 1, 1920, in *United States* v.

[25] During the nineteenth century, and the first part of the twentieth, property condemned under federal condemnation statutes was not actually taken by the Government until payment had been made or offered, and this Court held the owner not entitled to interest pending the proceedings, in the absence of statutory provision. *Shoemaker* v. *United States*, 147 U. S. 282, 321. *Baumann* v. *Ross*, 167 U. S. 548, 598. Cf. *Danforth* v. *United States*, 308 U. S. 271, 283–284. The first general condemnation statute, the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257–258, provided for acquisition of realty by proceedings by the Attorney General for condemnation in the federal courts, and conformed the "practice, pleadings, forms and modes of proceeding" to those "existing at the time in like causes in the courts of record of the State." Property was not taken in advance under this Act, but under the conformity provision certain lower courts followed state practice in allowing interest from a date prior to actual condemnation. See cases collected in *United States* v. *North American Co.*, 253 U. S. 330, 335. During and immediately prior to World War I, several emergency statutes provided for the taking of property prior to payment and placed the burden on the owner to sue for just compensation. See statutes cited in footnote 17, *supra*. It is under these acts that the cases involving the constitutional requirement of payment of interest have mainly arisen. See footnote 10,

North American Co., 253 U. S. 330, this Court, after reviewing the cases and doctrines, unanimously held that a claimant seeking just compensation in the Court of Claims, under the Tucker Act, for property previously taken by the Government, was not entitled to interest on the award from the time of taking. Mr. Justice Brandeis explained the lower federal court condemnation cases permitting recovery of interest on the ground that the applicable condemnation statute (e. g. Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257) "had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable [citing lower federal court cases]. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings in the Court of Claims." 253 U. S., at 335. Section 177 of the Judicial Code was cited as barring an allowance of interest on suits in that court on an implied contract resulting from a taking. To the company's argument that interest was ordinarily allowed in state court condemna-

supra. The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a, provides a general mechanism for the Government's securing possession and use of realty prior to judicial determination of just compensation; it provides for interest at 6 per cent on the amount finally awarded, from the date of actual taking to the date of payment.

tion cases "not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title," this Court acknowledged that "this *may* be the theory on which interest should be allowed in compensation proceedings; and it *may* be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in *condemnation proceedings brought by the Government.*" [Italics supplied.] But a claimant's suit for a taking, brought in the Court of Claims, was held to be a contractual action governed by Section 177. 253 U. S. at 336–338. It was not until the case of *Seaboard Air Line Railway* v. *United States,* 261 U. S. 299, was decided on March 5, 1923, that this Court, notwithstanding statutory silence, determined that the Constitution requires an award of interest in condemnation cases regardless of whether suit is brought by the Government or by the claimant.[26] And in *Jacobs* v. *United States,* 290 U. S. 13, decided in 1933, this doctrine was first actually applied to suits under

[26] The intervening case, *United States* v. *Rogers,* 255 U. S. 163, decided February 28, 1921, was a suit under the Act of August 1, 1888, *supra,* to condemn land in New Mexico. In that case this Court, after indicating doubt that the Conformity Act required that interest be awarded in accordance with the state law, upheld the award of interest without discussing the question whether the Fifth Amendment required that interest be included in the award.

the Tucker Act for a taking for which the United States was bound to make just compensation under the Fifth Amendment.[27] The contrary common understanding in 1920 is clearly shown by the express statement of the Court of Claims that "As a matter of law, this court in ordinary just compensation cases prior to the decision of the Supreme Court in the *Seaboard Air Line* case was of the opinion that under section 177 of the Judicial Code interest could not be included in the judgment. The *Seaboard Air Line case*, 261 U. S. 299, was decided by the Supreme Court March 5, 1923, and since then this court has included interest." *Willard R. Cook & Co., Inc.* v. *United States*, 80 C. Cls. 708, 711–712 (1935).[28] Cf. *Hutchison* v. *United States*, 57 C. Cls. 517, decided October 16, 1922.

Thus, it is plain that at the time of the adoption of the Military Academy Appropriation Act, 1921,

[27] The Court of Claims was long averse to granting interest in cases of implied contracts arising out of a taking, except in cases under the special wartime requisition statutes. In *Booth & Co.* v. *United States*, 61 C. Cls. 805 (1926); *Liggett & Myers Tobacco Co.* v. *United States*, 61 C. Cls. 693, reversed 274 U. S. 215; and *International Harvester Co.* v. *United States*, 72 C. Cls. 707, 719 (1931) interest was denied.

[28] The plaintiff's property had been requisitioned in 1917, and it brought suit for just compensation in 1918. The Court of Claims made an award but did not include interest. *Willard R. Cook & Co., Inc.* v. *United States*, 55 C. Cls. 537, decided June 18, 1920, no opinion. The sum awarded by the court was paid by the Government. Fourteen years later, the plaintiff brought suit for interest. The petition was dismissed.

in March 1920, the words "just compensation" were not universally understood to include interest, even in eminent domain cases. Indeed, in suits under the Tucker Act the rulings at that time excluded interest entirely. In using the words in the 1920 Act, Congress certainly did not incorporate the rules later laid down by this Court; the Congress legislated in the light of the then existing doctrine which, as we have shown, would have denied respondent's claim even if there had been an eminent domain taking. Here, where the requirements of the Fifth Amendment do not compel the Court to read a bare statutory provision for "just compensation" as including interest in order to hold the statute constitutional. (cf. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *Jacobs* v. *United States*, 290 U. S. 13, 17; *Smyth* v. *United States*, 302 U. S. 329, 353), the judicial connotation of the term, which prevailed at the time of the statutory enactment, should be imported into the act, rather than a later gloss.

D. THE ESTABLISHED PRESUMPTION IS THAT NON-EMINENT DOMAIN STATUTES INTEND TO BAR INTEREST UNLESS CONGRESS EXPRESSLY PROVIDES TO THE CONTRARY

It is a salutary rule, long followed by this Court, to assume that Congress has not lightly waived the "traditional immunity of the Government from the burden of interest," and to require of the claimant a clear showing of legislative intention to allow interest accruing prior to judg-

ment. In nonconstitutional matters, the rule denying interest has been applied "rigorously" and constitutes one of the "hardships from which, with rare exceptions [citing cases], Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts." *United States* v. *North American Co.*, 253 U. S. 330, 336. Section 177 (a) of the Judicial Code establishes this principle as the general rule, and exceptions from its scope must be found in special statutes.

But allowance of interest in non-eminent domain matters is a "matter of grace" on the part of Congress (*Hind* v. *United States*, 70 C. Cls. 288, 293; *Richmond, Fredericksburg & Potomac Railroad Co.* v. *United States*, 95 C. Cls. 244, 259), and it will be denied by the courts unless "expressly" or "specifically" authorized in a relevant special statute. *Tillson* v. *United States*, 100 U. S. 43, 46; *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260; *Cherokee Nation* v. *United States*, 270 U. S. 476, 487; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 47; *United States* v. *Goltra*, 312 U. S. 203, 207. Various special acts which have been claimed to authorize interest have all been found wanting. The statute in the *Tillson* case empowered the court to investigate the claim and "ascertain, determine, and adjudge the amount equitably due"; in *Harvey* v. *United States*, 113 U. S. 243, 249, the Court was authorized, "according to the rules and principles of equity juris-

prudence, in its judicial discretion," to "reform said contract and render such judgment as justice and right between the claimants and the said government may require" (see *Harvey* v. *United States,* 105 U. S. 671, at 680); in the *Boston Sand Co.* case, the special act empowered the court to adjudicate a collision case and to "decree for the amount of the legal damages * * * upon the same principle and measure of liability with costs as in like cases * * * between private parties"; in the *Goltra* case the insufficient words were "just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, * * * by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States." Similarly, the Attorneys General have consistently ruled that interest should not be paid unless the statute declares in express terms for its allowance. 1 Op. Atty. Gen. 268; 3 Op. Atty. Gen. 635, 639; 7 Op. Atty. Gen. 523, 525; 9 Op. Atty. Gen. 57, 59; 9 Op. Atty. Gen. 449, 450. Where Congress has desired to provide for interest, it has made its intention unmistakable. See 7 Op. Atty. Gen. 523; cf. Contract Settlement Act of 1944, 58 Stat. 649, 654, Sec. 6 (f), 41 U. S. C., Supp. V, 106 (f); Judicial Code, Section 177, 28 U. S. C. 284.

The presumption which this history illustrates should resolve any doubt in the instant case in favor of the Government.

In speaking of just compensation, eminent domain decisions, texts, and statutes universally speak of compensation *for* the property taken. Thus far in our argument, we have assumed that both the instant statute and lease were similarly phrased in terms of just compensation for the hotel. But the language which the Congress and the Secretary of War actually employed is "just compensation * * * *for the construction* of said hotel, appurtenances, and equipments." [Italics supplied.] In the court below, the Government agreed, in discussing the standard for computing the award, that these words were not free from ambiguity and presented a difficult problem of construction. But whatever the proper interpretation, it is clear that the italicized phrase differs significantly from the normal eminent domain language, and therefore the force of respondent's contention that interest must be included, *which rests solely on the identity of wording,* is seriously weakened by this admitted departure in terminology.

E. THE LEASE DOES NOT PROVIDE FOR PAYMENT OF INTEREST, EITHER EXPRESSLY OR BY IMPLICATION

The lease does not itself stipulate for the payment of interest, either expressly (as Section 177 (a) requires for an allowance of interest by the Court of Claims) or even by implication. Interest is nowhere mentioned in the agreement, and the contract provisions which relate to com-

pensation do not suggest any intention to provide it. At the expiration of the fifty-year term, or on cancellation of the lease by the Secretary of War, title to the hotel "shall pass at once to the United States," subject to the provisions for the payment of "just compensation" therefor (R. 10). Three separate clauses deal with the occasions for the payment of the compensation: (1) at the expiration of the fifty-year term; (2) on annulment of the lease by the Secretary of War for the lessee's failure to observe the covenants and conditions of the lease or the rules and regulations promulgated by the Superintendent under the lease; and (3) on termination of the lease by the lessee because of the erection of another hotel on the West Point reservation (R. 11–12). In each case, the words of the statute are followed, and "just compensation * * * for the construction of said hotel appurtenances and equipments" is to be made (R. 11–12).[29] Since, as we

[29] In the clause governing compensation on termination of the lease by the expiration of the fifty-year term, the lease does not follow the exact wording of the Act of March 30, 1920. The statute provides that the lease "* * * shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease." The lease provides that "just compensation shall be made to the party of the second part, or his assigns, for the construction of said hotel appurtenances and equipments which may then be upon the demised premises" (R. 11). We do not believe that the addition of the words "which may then be upon the demised premises" has any significance for the issue here pre-

have shown, the Act does not itself direct the payment of interest, the simple reiteration of the statutory formula, without more, cannot be read as stipulating for the allowance of interest. Especially so since, as in the instant case, "just compensation * * * for the construction" is to be paid on annulment of the lease because of an uncured breach by the lessee. Unless required to do so by the Constitution or by statute, the Government would hardly agree to pay full eminent domain compensation, including interest, where the lessee's breach is so gross that the Government finds it advisable or necessary to annul the agreements and take over the hotel. In such a case, the lessee's own fault having precipitated the premature take-over and necessitated the immediate determination of the compensation award, it would surely be unfair to impose upon the Government interest charges during the time it would take to compute the amount. If interest represents payment for the detention of the money value of the property at the time of the default (cf. *Boston Sand Co.* v. *United States*, 278 U. S. 41), the lessee should certainly be denied gain on the sum during this period; and if interest be thought to be the "measure of compensation for the use and occupation during the

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sented. In any event, we are here concerned with the clause governing compensation on annulment of the lease by the Secretary for the lessee's failure to observe its conditions, and that clause follows the statute exactly (R. 11).

period which precedes the passing of the title" (*United States* v. *North American Co.*, 253 U. S. 330, 337), the lessee has neither legal claim, since the lease clearly passed the title to the Government immediately on annulment, nor equitable claim, since its default occasioned the delay in payment.[39] It is sufficient to note, once again (see *supra*, pp. 8-9), that although respondent has studiously ignored the actual transactions leading up to its demand for just compensation, its breach of the covenant to operate the hotel caused the Secretary of War to annul the agreement in accordance with its terms (R. 11, 17, 29–30).

In its Brief in Opposition to the Petition for a Writ of Certiorari (p. 9), respondent charges the Government with having changed theories as to the meaning of "just compensation," between the time of the judgment below and the filing of the petition in this Court. But there has been no change in the Government's position. In the Court of Claims, the Government argued for a measure of compensation based on "fair value in March 1943," a concept drawn largely from the eminent domain use of "just compensation;" this fair

[39] In eminent domain proceedings, the claimant is not entitled to interest on amounts offered by the Government or paid into court at the time of taking, which are later judicially determined to be all that "just compensation" requires. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 542; Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 1, 40 U. S. C. 258a.

value of the hotel and furnishings was placed by the Government at $524,000.[31] At the same time, the Government urged that respondent was not entitled to interest since the statutory use of "just compensation" was intended to adopt the eminent domain concept only for valuation purposes and not to allow interest where no actual "taking" was involved. Respondent, on the other hand, contended that the statute was intended to award original costs as a measure of just compensation, and it denied the applicability of the usual eminent domain measures of fair value. It asked for judgment in the amount of $1,927,045.08. The lower court, stating that "just compensation * * * for the construction of this hotel is not subject to any nice calculation," found it to be $820,682 (R. 37, 31–32).[32] The court took into consideration "all relevant facts and circumstances, including the approximate cost of original construction," and "the cost of reproduction as of March 10, 1943, less depreciation" (R. 31, 37), but relied mainly on "sound value, that is, reconstruction new less depreciation" (R. 37). Just compensation for the equipment was found to be $47,000 (R. 32),[33] and the total

[31] The original cost was said by the Government not to exceed $1,142,707.04.

[32] Judge Whitaker thought that $500,000 "would be liberal compensation" (R. 38).

[33] The court found that "There was a market for the hotel equipment. The application of so-called 'sound' value to the equipmenf need not be resorted to" (R. 37; cf. R. 31).

award amounted to $867,682.00 plus interest (R. 32, 38).

Since neither party has sought review of the lower court's award of $867,682, we are not now concerned whether the correct method of calculation was adopted below or the correct figure adjudged, and the Government is not charged in this Court with defending the award. The sole issue here is the allowance of interest. On that issue we believe that the Court of Claims plainly erred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed to the extent that it includes an allowance for interest.

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DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946